Supreme Court, U.S.
FILED

(1)

932048 FEB 28 1994

No. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

Webb F. Henderson, Jr.

Joyce W. Henderson

Petitioners-Appellants,

v

Commissioner of the

Internal Revenue Service,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 4TH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Webb F. Henderson
Joyce W. Henderson
P. O. Box 576
Altavista, VA 24517

16 pp

Question Presented

Does IRS Code Section 167(e) apply to the tax returns filed for the tax year of 1983?

IRS Code Section 176(e) allows the taxpayer to change from any accelerated depreciation to the straight-line depreciation without the Commissioner's consent and is not limited in time. This section of the Code remained in effect until it was stricken effective for tax years ending after December 31, 1985.

Parties to the Proceedings:

Petitioners:

Webb F. Henderson, Jr.

Joyce W. Henderson,

Respondent:

Commissioner of the Internal Revenue Service,

TABLE OF CONTENTS

	page
Question Presented	1
Parties to the Proceedings	2
Table of Contents	2
Opinions Delivered	3
Jurisdiction Statement	3
Statute Involved	4
Statement of Case	5
Reasons for Granting Writ	6
Appendix	
U. S. Tax Court	A
U. S. Court of Appeals	B
U. S. Court of Appeals - Retry	C

Opinions Delivered

The opinion of the United States Tax Court dated April 19, 1993, which rendered the decision for respondent is attached in Appendix A.

The opinion of the United States Court of Appeals for the 4th Circuit, dated December 3, 1993, decision in favor of the Commissioner, is attached in Appendix B.

The opinion of the United States Court of Appeals for the 4th Circuit, dated January 4, 1994, which denied the petition for rehearing, is attached in Appendix C.

Jurisdiction:

The United States Court of Appeals for the Fourth Circuit decided Cecember 3, 1993 in favor of the Commissioner of Internal Revenue and is the judgement south to be reviewed. A petition for rehearing was denined on January 4, 1994. A timely petition for Writ of Certiorari was filed with the United States Supreme Court on

February 24, 1994 and was returned for corrections on March 17, 1994.

Title 28 U.S.C. 1254(1) authorizes jurisdiction of this case.

Statute Involved:

DEPRECIATION --Code Section 167

"(b) Declining balance to straight line. In the case of an account to which the method described in section 167(b)(2) is applicable, a taxpayer may change without the consent of the Commissioner from the declining balance method of depreciation to the straight line method at any time during the useful life of the property..."

"(d) *Change in respect to section 1250 property.* (1) In respect of his first taxable year beginning after July 1969, a taxpayer may elect, without the consent of the Commissioner, to change the method of depreciation of section 1250 property (as defined in section 1250(d)) from any

declining balance method or sum of the years-digits method to straight line method."

Statement of the Case:

The federal jurisdiction in this case tried in United States Tax Court was heard "pursuant to the provision of section 7443(b)(3) and Rules 180, 181, and 182." (Reference to Internal Revenue Code)

The factual history of the case recited in the memorandum (in Appendix A) opinion of Special Trial Judge Gussis is accurate. The only item contested is the application of Code Section 167 as it related to this issue, and the fact that Code Section 167 is not limited in time and was not repealed until after the tax year 1983 which is the year being questioned.

Reasons for Granting Writ:

Petitioners should be allowed to change their depreciation method as stated in Code Section 167, which was in effect for the tax year involved. If Code Section 168 contradicts that law, then Code Section 167 should have been stricken or changed to reflect the new law at the time of the change. This was not done until 1986.

Therefore, Petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

Webb F. Henderson, Jr.

Joyce W. Henderson

T. C. Memo 1993-171

UNITED STATES TAX COURT

WEBB F. HENDERSON AND JOYCE W. HENDERSON, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 6626-91 Filed April 19, 1993

Webb F. Henderson, Jr., and Joyce W. Henderson, pro sese.

Deborah C. Stanley, for respondent

MEMORANDUM OPINION

GUSSIS, Special Trial Judge: This case was heard pursuant to the provisions of section 7443(b)(3) and Rules 180, 181, and 182. All section references are to the Internal Revenue Code in effect for the year in issue. All Rule references are to the Tax Court Rules of Practice and Procedure, unless otherwise indicated.

Respondent determined a deficiency in petitioners' 1983 Federal income tax in the amount of $7,497.70. The sole issue for decision is whether petitioners were

entitled to change the method by which they calculated depreciation on an apartment building they owned from the accelerated cost recovery system methods to the straight line method.

Some of the facts were stipulated and they are so found. Petitioners were residents of Altavista, Virginia, at the time their petition was filed.

In the latter part of 1982, petitioners completed construction of an apartment building. The building was placed in service in November 1982. On their joint income tax return for 1982, petitioners claimed a depreciation deduction for the building using the Accelerated Cost Recovery System (ACRS) method. The building was sold on December 30, 1983. On their joint 1983 return petitioners claimed a depreciation deduction for the building using the straight line method. Filed with the

petitioners' 1983 return was an application for revocation of their election of the ACRS depreciation method.

Petitioners contend that the depreciation of the building is governed by section 167 and that therefore they may change the method of depreciating the building without prior approval by respondent in accordance with section 167(e) as then applicable. Respondent argues that the depreciation of the building is governed by section 168 and that section 167(e) is therefore inapplicable.

Section 167(a) allows as a depreciation deduction a reasonable allowance for the exhaustion, wear, and tear of (1) property used in a trade or business, or (2) property held for the production of income. Section 168, however, governs the depreciation of assets placed in service subsequent to December

31, 1980, in taxable years ending after such date. For such assets, the provisions of section 168 are mandatory. However, a taxpayer is permitted to elect an alternate method of depreciation provided in section 168(b)(3). See Barron v. Commissioner, T.C. Memo 1992-598. Any such election under this section, however, must be made for the taxable year in which the property is placed in service. See sec. 168(f)(4). Moreover, once a method of depreciation is elected, it may be revoked only with the consent of the Secretary. Sec. 168(f)(4)(c). Here, the apartment building at issue was placed in service in November 1982, and there is nothing in the record to indicate that petitioners made an appropriate election to depreciate the building under an alternate method of depreciation provided by section 168. Petitioner's belated attempt to change from the ACRS depreciation method, which they

originally used on their 1982 return, to a *straight line method in 1983 is untimely* under the clear and unambiguous provisions of the statute. On this record, respondent must be sustained.

Petitioners seek relief on the grounds of unreasonable delays by respondent in concluding the examination of their 1983 tax return. Petitioners' request is apparently premised on general principles of equity. The jurisdiction of this Court to grant equitable relief is strictly limited; it exists only to the extent enumerated by statute, and it does not include the power to make tax liability turn on such equitable considerations. Kellogg v. Commissioner, 88 T.C. 167, 176 (1987).

Decision will be entered for respondent.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Webb F. Henderson, Jr.	)	
Joyce W. Henderson,	)	
Petitioners-Appellants,	)	
v.	)	No. 93-1937
Commissioner of the Internal	)	
Revenue Service,	)	
Respondent-Appellee.	)	

Appeal from the United States Tax Court,

(Tax Ct. No. 91-6626)

Submitted: November 18, 1993

Decided: December 3, 1993

Before HALL, PHILLIPS, and MURNAGHAN,

Circuit Judges,

Affirmed by unpublished per curiam opinion.

COUNSEL

Webb F. Henderson, Jr., Joyce W. Henderson,

Appellants Pro Se.

Bruce Raleigh Ellisen, Gary R. Allen, Jordan Laytin Glickstein, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D. C.; David L. Jordan, INTERNAL REVENUE SERVICE, Washington, D. C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellants appeal from the Tax Court's decision finding in favor of the Commissioner. Our review of the record and the Tax Court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the Tax Court. *Henderson v. Commissioner*, No. 91-6696 (I.R.S. Apr. 21, 1993). We dispense with oral agreement because the facts and legal contentions are adequately presented in the

materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED JANUARY 11, 1994

No. 93-1937 No. 91-6626

Henderson v. Commissioner

M A N D A T E

The judgment of this court dated 12/3/93 takes effect today.

BERT M. MONTAGUE

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

January 4, 1994

No. 93-1937

91-6626

WEBB F. HENDERSON, JR.; JOYCE W. HENDERSON

Petitioners - Appellants

v.

COMMISSIONER OF THE INTERNAL REVENUE SERVICE

Respondent - Appellee

O R D E R

Appellants have filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

CLERK